No. 20148

In the

United States Court of Appeals

For the Ninth Circuit

OTTO H. LINSENMEYER,
Appellant,

vs.

MGM LABORATORIES, INC.,
Appellee.

Brief for Appellee

On Appeal from the United States District Court
for the District of Arizona

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STATEMENT OF THE CASE

Prefatory Statement.

If is difficult to know where to begin answering a brief in which the only statement of fact is a cursory outline of the pleadings and procedure leading to a verdict for the Appellee, and in which, whatever facts are set forth, are thoroughly intermixed with argument. Those inconvenient facts upon which the District Court relied in arriving at its decision are entirely ignored.

Because Appellee is unable to accede either to the accuracy or the adequacy of Appellant's treatment of this

case, Appellee is obliged to submit the following detailed statement of the facts and evidence.

Detailed Statement of the Facts and Evidence.

1. RELATIONSHIP BETWEEN OTTO LINSENMEYER AND DAVID L. JOHNSON.

Sometime during the year 1960, the appellant Otto Linsenmeyer (hereinafter called Linsenmeyer), an attorney and an investor (T.P. 365) began to do legal work for David L. Johnson (hereinafter called Johnson) (T.P. 383). Beginning in 1961 and continuing into 1962 numerous personal loans between the two men occurred. These consisted of substantial sums, with Johnson, at one time lending to Linsenmeyer $50,000.00 and Linsenmeyer lending up to $10,000.00 to Johnson (T.P. 532-533). These transactions were made and based upon friendship, the loans bearing no interest, carrying no security and often, not even represented by a promissory note (T.P. 533).

2. CORPORATE VENTURES OF OTTO LINSENMEYER AND DAVID L. JOHNSON.

Four Arizona corporations were organized within a seven-month period beginning in July of 1961. Linsenmeyer acted as attorney in the formation of all four (T.P. 365, 370).

(i) **Acme Rental and Supply Co.** (hereinafter called Acme):

This corporation was organized in August of 1961 (R.A. Docket No. 8, page 2) with Linsenmeyer and Johnson as two of the three incorporators. Each of them owned two hundred fifty shares of capital stock (R.A. Docket No. 8, page 2).

(ii) **AllState Materials Co.** (hereinafter called AllState):

This company was organized in January of 1962 with Linsenmeyer and Johnson as sole incorporators. Each

owned fifty percent stock interest and each was an officer and director (R.A. Docket No. 8, page 2).

(iii) **City Developers Supply Co.** (hereinafter called City Developers):

This company was organized in September of 1961 but was renamed City Developers in February of 1962. Linsenmeyer and Johnson were two of the three incorporators and each owned a fifty percent stock interest in the company and was an officer and director (R.A. Docket No. 8, pages 2 & 3).

(iv) **Producers International Pictures, Inc.** (hereinafter called PIP):

This company was organized in July of 1961 (T.P. 148), the purpose of the company being to acquire and distribute motion pictures. Johnson was one of the incorporators and President as well as a director (R.A. Docket No. 8, page 3). On February 16, 1962, Linsenmeyer became Secretary-Treasurer and a director of the company (Plaintiff's Exhibits 10 & 11 in evidence), and was given orally by Johnson, the President and sole stockholder (T.P. 371, 372) a twenty-seven and one-half percent stock interest in the company (T.P. 376-377).

3. LACK OF SEPARATE AND DISTINCT CORPORATE IDENTITY.

There was only one thing that the four companies had that enabled them to be called corporations—certificates of incorporation (T.P. 368).

(i) **By-Laws:** None of the corporations had By-Laws (T.P. 368).

(ii) **Stock Books:** None of these corporations had a stock book (T.P. 367, 371).

(iii) **Minute Books:** None of these corporations had a minute book (T.P. 367, 372).

(iv) **Income Tax Returns**: Up until ninety days prior to the trial, no corporate income tax returns had ever been prepared (T.P. 367, 368).

(v) **Business Addresses**: Acme, AllState and City Developers used one and the same address in Phoenix, Arizona (T.P. 368).

(vi) **Shares of Stock and Capitalization**: In none of the corporations (T.P. 534) except PIP was any stock ever issued to a stockholder. In PIP there were only one hundred shares of stock issued with a par value of $10.00 per share for a capitalization of only $1,000.00 (T.P. 371, 372).

(vii) **Bank Accounts**: All four of the corporations opened bank accounts at approximately the same time, in the same branch of the First National Bank of Arizona (T.P. 100, 101).

4. OPERATION AND MANAGEMENT OF THE COMPANIES.

A. PIP.

(i) **Formation.**

In the spring of 1961 William Hunter (hereinafter called Hunter) met Johnson (T.P. 147). At this time Hunter was in the motion picture distribution business (T.P. 147). Discussions concerning the formation of a motion picture distribution company took place between Hunter, Johnson and Linsenmeyer in Phoenix, Arizona (T.P. 148), at Linsenmeyer's office (T.P. 149). Neither Linsenmeyer nor Johnson had any experience in the motion picture business (T.P. 149, 150; 526, 527) and Johnson and Linsenmeyer associated with Hunter because of his experience in that field (T.P. 150).

After the formation of the corporation in July of 1961, Hunter was made a Vice President (T.P. 151) and was left

on his own due to his knowledge of the film business. He began acquiring motion picture films and undertook to have signed franchise contracts for their distribution with distributors all over the country (T.P. 151, 152).

Hunter's initial activities on behalf of the company were known to Linsenmeyer in the summer, fall and winter of 1961, prior to the time when Linsenmeyer became an officer and director of PIP (T.P. 154, 156).

(ii) **Linsenmeyer's Participation in Activities of PIP.**

In the spring of 1962 in order to make prints from the films which Hunter had acquired for PIP, Hunter executed a contract with MGM Laboratories, Inc. (hereinafter called MGM), the Appellee herein (T.P. 47). During all the time that Hunter was dealing with MGM on behalf of PIP Linsenmeyer was fully informed and aware of what was going on (T.P. 180-183).

The indebtedness incurred by PIP to MGM for the printing of motion picture film was known to Linsenmeyer both during the time that MGM was doing the laboratory work in making the motion picture prints and after the work was completed (T.P. 185).

In the spring of 1962, PIP borrowed $80,000.00 from the First National Bank of Arizona (Plaintiff's Exhibits 15, 16 & 17 in evidence). This loan was negotiated by Linsenmeyer (T.P. 115, 388). Linsenmeyer obtained as an endorser on the note his sister, Irma Linsenmeyer (T.P. 261, 391). This loan was to be used to pay for the two motion pictures that Hunter had acquired in Europe, "The Huns" and "The Centurians" (T.P. 114, 154, 155).

(iii) **Income to PIP.**

In the summer and fall of 1962 monies came into PIP from the distribution of the prints made by MGM (T.P. 189).

$56,087.20 came into PIP from the Army and the Navy (T.P. 582). This was the only real income ever earned by PIP (T.P. 285). The money came into the company between August 17 and October 15, 1962 (T.P. 583).

(iv) **Monies Out of PIP.**

Between February and October of 1962, monies in excess of $56,000.00 were paid out of PIP to, among others, Linsenmeyer and Johnson and to Acme, AllState and City Developers (Plaintiff's Exhibit 27 in evidence). These monies went not only to the companies but to the Johnson and Linsenmeyer Account.

B. BANK ACCOUNTS, THEIR TREATMENT AND OPERATION.

The Maryvale Branch of the First National Bank of Arizona was the depository of the accounts of Acme, AllState, City Developers and PIP (T.P. 100, 101). On the accounts of Acme, AllState and City Developers, Johnson and Linsenmeyer could sign checks (T.P. 102).

In addition to the corporate accounts there existed an account at the same branch, known as the Johnson and Linsenmeyer Investment Account (hereinafter called Johnson and Linsenmeyer Account). This was a joint tenancy account with the right of survivorship (T.P. 101). Either Johnson or Linsenmeyer could sign checks on this account (T.P. 102).

(i) **Inter-Account Transfers and Transactions.**

There existed at the Maryvale Branch of the First National Bank of Arizona a method or procedure whereby interbank transfers could occur between accounts at the same branch. These transfers were handled in a manner known as "Advice of Charge" slips (T.P. 105, Plaintiff's Exhibits 24, 25 & 27 in evidence). This method was used, instead of and in addition to the drawing and depositing

of checks. Monies were thus moved back and forth between the four corporate accounts and the Johnson and Linsenmeyer Account (T.P. 104, 104). Most of the transfers of monies between and among these five accounts took place by inter-bank transfers using "Advice of Charge" slips (T.P. 105).

The transfers would occur when one account had insufficient funds so that a transfer of money from an account which had adequate funds was needed to make up any deficit (T.P. 107).

The bank made such transfers on verbal requests from both Johnson and Linsenmeyer (T.P. 107, 425). Money was transferred in this way from, to and between all four corporate accounts and the Johnson and Linsenmeyer Account (T.P. 104, 105, 310, 311).

Monies from PIP went to the accounts of AllState, Acme and City Developers (T.P. 579), without the formality of writing a check. Monies from Acme, City Developers and AllState went into the Johnson and Linsenmeyer Account (T.P. 112, 113, Plaintiff's Exhibit 27 in evidence), without the formality of writing a check. Substantial amounts were thus transferred into the Johnson and Linsenmeyer Account from Acme, AllState and City Developers, which companies obtained monies from PIP (T.P. 580-581).

There did not exist one corporate resolution in any of the four corporations authorizing such transfers of funds as had been taking place within the Maryvale Branch of the First National Bank (T.P. 104, 421, 422, 423, 426).

THE COURT'S OPINION

The trial judge on the day he rendered his decision stated from the bench some of his reasons, as follows:

"So the question arises as to whether or not this Court should or should not, as we call it, pierce the corporate veil.

I will not pierce the corporate veil of PIP for the entire amount owing to MGM, because there is virtually nothing to indicate that when the MGM-PIP contract was entered into there was any financial manipulation of the PIP account by or among the corporate or individual defendants.

However, this does not dispose of the case.

There is a different question arises when we consider the treatment of the receipts of PIP.

In February 1962 Mr. Linsenmeyer became secretary-treasurer of that company, and a member of its Board. Either then or some time thereafter it was agreed that he would become the owner of a percentage of the stock of that company.

At this time, that is, in February of 1962, he and Mr. Johnson were fifty-fifty, 50 per cent owners of the stock of the defendant corporations other than PIP, and had equal rights in Johnson and Linsenmeyer partnership.

Then, that is, after February, 1962, began the use of so-called Advice-of-Charge transactions, which became very active in July, August, and September, 1962.

To say that these Advice-of-Charge memos were an unusual way of doing business is putting it mildly. And to say that the action of the bank in recognizing them without any written corporate resolutions was so unusual, to put it mildly.

In August, September, and October, 1962, payments from the Army and Navy to PIP were made aggregating $56,087.20. The amounts so received by PIP were paid out largely by the Advice-of-Charge procedure, that is, the receipts were treated as property of the corporation, and/or the individual and corporate defendants.

Perhaps there were *inter partes* loans of one sort or another by the defendants, but in any event the transactions were so mixed that they were as one with Johnson and Linsenmeyer; and it takes no speculation, but just plain common sense to hold that all investments were treated as for the benefit of Johnson and Linsenmeyer.

And thus we may conclude that at least insofar as the Army and Navy payments are concerned, it is clear that the corporate veil or veils may be pierced.

It clearly appears that the Army and Navy monies belonged to the creditors of PIP. Any monies advanced by the corporations, other than PIP, or Johnson-Linsenmeyer, should be treated as investments in PIP, rather than loans, certainly insofar as the creditors of PIP are concerned.

As the only creditor before the Court in this proceeding is the plaintiff, I award judgment in favor of MGM in the amount of the Army and Navy payments, namely, $56,087.20, against all the defendants other than PIP.

To recapitulate: As I indicated, the free-wheeling operation of PIP occurred mainly during the period of July through September or October, 1962, a considerable time after the formation of the contract between the MGM and PIP.

During this period, and to a lesser extent at other times, the individual defendants were transferring their money back and forth in an attempt to keep their various corporations alive.

This may not have been fraudulent. However, I do not mean to condone such activity.

MGM was an existing, legitimate creditor prior to PIP's receipt of the Army and Navy contract payment, which was the only income of any consequence received by PIP.

To allow withdrawals of this income by the defendants would result in the enrichment, the unjust enrich-

ment of the individual and corporate defendants other than PIP.

Even if there were withdrawals, even if these withdrawals are considered loan repayments, they cannot under the circumstances of this case take precedence over the proved debt owing to a *bona fide* creditor, which of course MGM was." (T.P. 641, line 14-644, line 11).

Thereafter, Findings of Fact were made (R.A. Docket No. 16). The Court found as facts, among other things, the following:

"6. The corporate defendants All State Materials Co., Inc. and City Developers Supply Co. were equally owned by the individual defendants, Otto Linsenmeyer and David L. Johnson. The corporate defendant Acme Rentals and Supply Co. had outstanding stock in the amount of 250 shares owned by David L. Johnson and 500 shares owned by Otto Linsenmeyer. In none of the three corporations was any stock ever issued or delivered to the individual defendants, who were also officers and directors of these corporations. Producers International Pictures, Inc. had as its President, David L. Johnson and, since February, 1962, as its Secretary-Treasurer, Otto Linsenmeyer. Both of these men were President and Secretary-Treasurer thereof respectively. All stock in Producers International Pictures, Inc. was owned by David L. Johnson, however Otto Linsenmeyer had a right or option to purchase 27½% of the stock owned by David L. Johnson.

7. All corporate defendants had their business checking accounts in the Maryvale Branch of the First National Bank of Arizona, and in addition thereto, Johnson and Linsenmeyer had an individual personal joint tenancy account, with the right of survivorship, at said bank and branch. David L. Johnson had his personal account at said branch also.

8. All the corporations were either organized by the individual defendants or operated by them as their alter ego.

9. None of the corporate defendants had any genuine or separate corporate existence, no separate phone listings, no by-laws or stock book, no minute book, or any other indicia of corporate management was ever in existence. All corporate defendants here were used for the purpose of permitting Otto Linsenmeyer and David L. Johnson to transact their individual businesses under a corporate guise." (R.A. Docket No. 16, page 1, line 27-page 2, line 20.)

"12. Into the Johnson-Linsenmeyer Investment Account at the First National Bank of Arizona, Marysville Branch, were deposited funds from all the corporate defendants and that from the Johnson-Linsenmeyer Investment Account varying sums of money went into all the corporate defendants' accounts.

13. No corporate resolutions ever existed showing any authority in any of the corporations to either lend money to or borrow money from Otto Linsenmeyer and/or David L. Johnson personally or to lend to or borrow from any of the corporate defendants.

14. First National Bank of Arizona, Maryvale Branch, made inter-corporate transfers among and between all the corporate defendants, as well as between these accounts and the Johnson-Linsenmeyer Investment Account and the Otto Linsenmeyer and David L. Johnson personal checking accounts. These inter-corporate and inter-personal account transfers were made by the bank by what was known as "advice of charge slips". These inter-corporate and inter-personal account transfers were made by the First National Bank of Arizona, Maryvale Branch, whenever one of the corporate accounts or personal accounts of the individual defendants had insufficient funds, said transfers being made from one or more of the concerned accounts with sufficient funds.

15. From all the corporate accounts were transferred substantial amounts of cash directly to the individual defendants, David L. Johnson and Otto Linsenmeyer or paid out for their benefit.

16. No corporate authority whatsoever existed in any of the defendant corporations authorizing said inter-corporate transfers of funds as took place and were handled by the First National Bank of Arizona, Maryvale Branch.

17. Between February and November, 1962, over $185,000.00 was deposited into the Johnson-Linsenmeyer Investment Account, among other sources, Otto Linsenmeyer, David L. Johnson, Producers International Pictures, Inc., All State Materials, Acme Rental and Supply Company and City Developers.

18. From August, 1961 through October, 1962, over $138,000.00 was deposited into the bank account of Producers International Pictures, Inc.

19. During the months of June through September, 1962, there was deposited $56,087.20 into the Producers International Pictures, Inc. account, representing monies paid to the corporation from the Army and Navy for acquisition or rental of two motion picture films to be distributed by Producers International Pictures, Inc.

20. Between February 1962 and October, 1962, there was paid out of Producers International Pictures, Inc., either directly to the defendants Otto Linsenmeyer and David L. Johnson or to other corporations in which they were officers, directors, stockholders, monies in excess of $56,000.00 and monies were also paid out of Producers International Pictures, Inc. account into the Johnson-Linsenmeyer Investment Account and from there distributed to other payees in which and with which the individual defendants, David L. Johnson and Otto Linsenmeyer had private business dealings.

21. For all of these transfers out of Producers International Pictures, Inc. to David L. Johnson and/or Otto Linsenmeyer, or any of the corporations that they controlled, there were no corporate resolutions or other authorizations warranting or authorizing such transfers or said withdrawals of monies." (R.A. Docket No. 16, page 3, line 1-page 4, line 15)

SOLE QUESTION PRESENTED

Whether the evidence is sufficient to support the findings of the lower Court that the defendant corporations had no genuine or separate corporate existence and were thus used as the alter ego of Otto Linsenmeyer, permitting him to transact his individual business under a corporate guise?

SUMMARY OF ARGUMENT

1. Appellant is not entitled to run, manage and control corporate entities as an adjunct of his personal business operations, investments and manipulations without incurring personal and individual liability for the actions so undertaken, and the debts incurred.

2. The corporate substance must be examined and not the mere form.

3. Appellant is not entitled to the protection usually afforded by the corporate way of doing business, for the following reasons:

(a) Not even a pretense was made by the Appellant to maintain the semblance of separate and distinct corporate entities.

(b) None of the corporations had By-Laws, minute books, stock books, adequate, if any, capitalization or issued stock.

(c) No board meetings, no stockholders meetings and no resolutions therefrom existed, permitting, allowing or authorizing inter-corporate transfers of money between all four corporate accounts and the Johnson-Linsenmeyer Investment Account.

4. Linsenmeyer, as an officer, director and stockholder in all four companies, as well as a signatory on the Johnson-Linsenmeyer joint tenancy Investment Account knew all

about the financial doings of the companies and the monies going into and flowing from the Johnson-Linsenmeyer Account. He personally received money from all of the companies, through the conduit of the Johnson-Linsenmeyer Account, monies having flowed directly into this account from the four corporations and paid out either to Appellant or for his benefit.

ARGUMENT

I. Preliminary

The judgment of the District Court should be affirmed on the sole ground that Appellant's argument is nothing more than a plea for this Court to re-weigh and re-evaluate the evidence before the trial Court and rewrite its Findings of Fact.

It should be unnecessary to engage in an extended discussion on the established rule that the Findings of Fact of a District Court may not be set aside unless clearly erroneous. In *Darter v. Greenville Community Hotel Corporation,* 301 F.2d 70 (C.A. 4th, 1962), it was clearly held that unless unsupported by substantial evidence, findings of fact of a District Court may not be set aside.

Rule 52(a) of the Federal Rules of Civil Procedure, 28 U.S.C. in pertinent part provides:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial Court to judge of the credibility of the witnesses."

The United States Supreme Court further refined the standard in *United States v. United States Gypsum Co.,* 333 U.S. 364, 68 S.Ct. 525, (1948), when it stated:

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing Court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

Id. 395, 68 S.Ct. 542. In this connection see also *Olympic Finance Co. v. Thyret,* 337 F.2d 62 (C.A. 9th, 1964).

The Appellant has not specifically related the Findings of Fact to his argument, nor has he pointed out with any particularity whatsoever where the findings of the trial Court are clearly erroneous, which here is his burden. *Glens Falls Indemnity Company v. United States,* 229 F.2d 360, 373 (C.A. 9th, 1956). All the Appellant has done is to make a bald assertion that the trial Court erred in finding the fact that the defendant corporations were an alter ego of the Appellant (Appellant's Opening Brief, page 6).

II. District Court Properly Found That the Defendant Corporations Were the Alter Ego of the Appellant

DISREGARDING THE CORPORATE ENTITY

Ordinarily, a corporation is treated as a legal entity, separate and distinct in identity from the members who comprise it. 18 C.J.S. Corporations, § 4, p. 368.

Apart from constitutional, statutory, or charter provisions, the directors and officers of a corporation are not, as such usually, personally liable for the corporation's debts. 19 C.J.S. Corporations, § 839, p. 262.

However, where the director or officer is the alter ego of the corporation, that is, where there is such unity of interests and ownership that the separateness of the individual and corporation has ceased to exist, and the facts are such that such an adherence to the fiction of separate existence of the corporation would sanction a fraud or promote injustice, such director or officer will be held liable for obligations of the corporation.

In the leading Arizona case of *Employers Liability Assurance Corporation v. Lund,* 82 Ariz. 320, 313 P.2d 393 (1957), the Court laid down the rules pertaining to the cir-

cumstances necessary if the corporate veil is to be pierced. In this case, the Appellants were engaged in the business of marketing farm products, both as an individual, and in a partnership with others. In the winter of 1950 a marketing company was organized and this company continued until its affairs were terminated by insolvency in the fall of 1951. In this company the Appellant, his wife and his son owned all but one share of stock. The three family members were the principal officers, directors and stockholders of the corporation. The Court found that they controlled the corporation's assets and its operations. The Court also found that the business engaged in by the corporation was the same business that the individual father had engaged in prior to the incorporation. Its area of operation, the office location, office equipment, post office address and telephone number were identical. The Court in this case found that the family was the alter ego of the corporation. The Court said:

> "The corporation fiction will, however, be disregarded upon the concurrence of two circumstances; that is, when the corporation is, in fact, the alter ego of one or a few individuals and when the observance of the corporate form would sanction a fraud or promote injustice. *Whipple v. Industrial Commission,* 59 Ariz. 1, 121 P.2d 876; *Walker v. Southwest Mines Development Co.,* 52 Ariz. 403, 81 P.2d 90; *Gonzales & Co., Brokers v. Thomas,* 42 Ariz. 308, 25 P.2d 552; *Mosher v. Lee,* 32 Ariz. 560, 261 P.35; *Phoenix Safety Investment Co. v. James,* 28 Ariz. 514, 237 P. 958; *Brice v. Sanger Bros.,* 28 Ariz. 15, 229 P. 397. The disregard of the corporate fiction has not been limited to instances where the incorporation is for fraudulent purposes, but may be observed if after organization the corporation is employed for fraudulent purposes. *Stark v. Coker,* 20 Cal.2d 39, 129 P.2d 390; *Advertects, Inc. v. Sawyer*

Industries, Fla., 84 So.2d 21; *Whitney v. Leighton,* 225 Minn. 1, 30 N.W.2d 329." (82 Ariz. 323, 324)

"In this jurisdiction it is settled that a fraud may be perpetrated by the giving of a promise to perform a future act made with the present intention not to perform. *Waddell v. White,* 56 Ariz. 420, 108 P.2d 565; *Law v. Sidney,* 47 Ariz. 1, 53 P.2d 64. It also seems to be accepted that a buyer's nondisclosure of insolvency constitutes a fraud where it is coupled with an intent not to pay for the goods." (82 Ariz. 324, 325)

The *Lund* case evolved from a long line of Arizona decisions which historically up to the present time have defined and laid the groundwork for the occasions when the corporate veil may be pierced.

In the case of *Whipple v. Industrial Commission,* 59 Ariz. 1, 121 P.2d 876 (1942), the Court stated that questions about piercing the corporate veil had been presented to it on many prior occasions. The Court in this case tended to synthesize the law in Arizona pertaining to this subject. The facts were simple. The Appellants were the operators of a sawmill and an employee of the sawmill was injured while working for the corporation. The Industrial Commission of the State of Arizona felt that the company was merely the alter ego or cloak of Whipple, who organized the company for the express purpose of permitting engagement in the sawmilling business without any personal liability for injuries to employees under the Compensation Act. The Court in this case said:

"A corporation is merely a legal fiction created for the convenience of conducting business, the true human entity behind it being the stockholders who, in reality, own it and all its property, though the legal title may stand in the name of the corporation. It is well settled as a general rule that when this fiction of the law is urged and carried on for an intent not within the reason and the purpose for which it is allowed by the

law, the form should be disregarded and the corporation should be considered merely as an individual or an aggregation of persons both in equity and law. 18 C.J.S., Corporations, p. 376, § 6.

We have had questions like this before us on a number of occasions and have always followed the above rule. In the case of *Phoenix Safety Inv. Co. v. James,* 28 Ariz. 514, 237 P. 958, 959, the Court said:

'The Courts will disregard corporate form when justice requires it to look to the substance and not to the shadow (citing cases).

The language of the Court in *Minifie v. Rowley,* 187 Cal. 481, 303 P. 673, is apt:

' "Before the acts and obligations of a corporation can be legally recognized as those of a particular person, and vice versa, the following combination of circumstances must be made to appear: First, that the corporation is not only influenced and governed by that person, but that there is such a unity of interest and ownership that the individuality, or separateness, of the said person and corporation has ceased; second, that the facts are such that an adherance to the fiction of the separate existence of the corporation would under the particular circumstances, sanction a fraud or promote an injustice." '

While most of the cases on this subject deal with the rights of creditors, we see no reason why the principle does not apply equally in any other case where justice requires it.'

The same question arose in *Mosher v. Lee,* 32 Ariz. 560, 261 P. 35, and we held that the corporation referred to therein was merely a corporate form through which an individual could handle certain business, and we disregarded the form and held the individual responsible."

(a) Control

There can be no doubt that Linsenmeyer was a stockholder in PIP as he was in the three other corporations. From his own testimony (T.P. 376) this is patent. He cannot be permitted to say that he was not a stockholder in PIP because no stock was ever received by him, since he acknowledges that he was a stockholder in the three other companies though no other stock was ever issued by them either (R.A. Docket No. 8; T.P. 534).

In all four corporations Linsenmeyer was an officer and director as well as the companies' attorney (T.P. 365, 370; R.A. Docket No. 8; Plaintiff's Exhibits 10 & 11 in evidence).

It can, therefore, be seen that Linsenmeyer along with his partner, Johnson, were the sole controlling influences over the companies.

(b) Lack of Individuality

These four companies were so identified with Linsenmeyer and his partner, Johnson, that both men completely ignored maintaining any semblance of a distinct separateness between the companies. For not one of the companies were there even form By-Laws (T.P. 368). Aside from the minutes in evidence (Plaintiff's Exhibits 10 & 11 in evidence), no other minutes for any of the companies existed, or, at least, were ever produced by the Defendants during the trial. There was not maintained a minute book for any company (T.P. 367, 372), nor was there a stock book for any company (T.P. 367, 371). No corporate income tax returns were regularly or timely filed (T.P. 367, 368).

Most indicative of all is the almost total lack of capitalization in any of the corporations. Only in PIP was stock ever issued, $1,000.00 worth (T.P. 371, 372). In one California case, *Minton v. Cavaney,* 15 Cal. 641, 364 P.2d 473

(1961), the Court held that equitable owners were personally liable because they treated the corporate assets as their own, added and withdrew money at will and initially provided inadequate capitalization. How well this applies to the case before the Court.

(c) Unity of Interest and Ownership

The oneness of Linsenmeyer and his companies can best and most clearly be seen by the manipulation of the corporate bank accounts and the Johnson-Linsenmeyer Account (Plaintiff's Exhibit 29 in evidence).

During the whole trial, Linsenmeyer maintained that any money put into any of the corporations were loans. His own accountant, Mr. Brown, treated them as such—but only because it was convenient (T.P. 284, 285). Linsenmeyer thusly maintained that monies paid out by these companies to any of the other companies or to Johnson, Linsenmeyer or to their joint account, were repayments of such purported loans (T.P. 450). Yet, both the documentary evidence in the form of corporate and individual financial statements (Plaintiff's Exhibits 1, 1A, 2, 3, 4, 5, 6 & 7 in evidence) and the lack of any corporate resolutions permitting such dealings, prove conclusively that these monies were not loans by the broadest stretch of the imagination. They were merely personal and private monetary transfers and manipulations by Linsenmeyer and Johnson.

During the trial the following exchange occurred, Linsenmeyer was testifying:

> "Q. Using the Johnson-Linsenmeyer account as an entity, any monies that came into it from these four corporations, is it your testimony that these were in repayment of loans made by that entity to either or any of those four corporations?

A. Yes. Of the separate monies in the account belonging to the individuals Johnson or Linsenmeyer.

Q. Is there any evidence in any of the corporations either in your possession or Mr. Johnson's possession evidencing such loans in the forms of notes, bonds, or other indicia of debt?

A. Due those four corporations?

Q. That is right.

A. I don't think there was any evidences.

Q. Were these loans interest-bearing?

A. No.

Q. Were these loans secured by any security?

A. No.

Q. You are aware, to use your gesture, Mr. Linsenmeyer, meaning the circuity of money flowing, that monies did flow not only from the corporations into Johnson-Linsenmeyer, but between the corporations themselves, inter-bank transfers. You are aware of that?

A. Yes, I am aware of that fully.

Q. Now, are there any notes in the corporations, or bonds, or other indications of loans that these corporations have indicating borrowing between them?

A. No, just ledger entry.

Q. Just ledger entries?

A. Yes.

Q. Denominated Loans?

A. Yes.

Q. By Mr. Brown?

A. By Mr. Brown, and also by the CPA's Racey & Associates, and approved by the U. S. Director of Internal Revenue.

Q. Were these inter-corporate exchanges of monies which you are claiming are loans, were these interest-bearing when money went from All State to Acme, or from PIP to City Developers?

A. No.

Q. Not interest-bearing?

A. No, sir.

Q. Non-secured?

A. Well, I think they were secured good enough for Mr. Johnson and myself, because we owned all the outstanding stock in the Acme, All State, and City Developers ultimately.

Q. That is exactly what I am driving at, Mr. Linsenmeyer. You and Mr. Johnson were your own security, and your own entity, isn't that correct?

A. No. No, I wouldn't say that we were alto ego of the corporations, but we used those funds between corporations as they were required to be used, just like if we went to the bank and borrowed the money, we didn't have to give the bank the resolution every time we borrowed any money." (R.T. 450, line 9 through 452, line 13)

The financial dealings by Linsenmeyer and the companies were such that the trial judge, the Honorable Walter M. Bastion, was able to say:

"To say that these Advice-of-Charge memos were an unusual way of doing business is putting it mildly. And to say that the action of the bank in recognizing them without any written corporate resolutions were also unusual, to put it mildly." (T.P. 642)

(d) Injustice Amounting to Fraud to Adhere to Corporate Fiction

From Plaintiff's Exhibits 28 and 29 in evidence, there can clearly be seen that the amount of money that went into and out of PIP and the Johnson-Linsenmeyer Account was substantial. From Plaintiff's Exhibit 27 in evidence and the testimony of Mr. Nevlin can be determined the passage of money from PIP to the other three corporations and from these three corporations, to-wit, Acme, All State and City Developers, there passed into the Johnson-Linsenmeyer Account substantial sums (T.P. 104, 105; 310, 311; 579; 112, 113; 580-581).

In a period of a few months somewhere between $185,000.00 and $220,000.00 went through the Johnson-Linsenmeyer Account (T.P. 576; Plaintiff's Exhibit 29 in evidence).

The Army and Navy money of over $56,000.00 went into and out of PIP between August 17 and October 31, 1962, when the PIP bank account was, for all practical purposes, closed (T.P. 583; Plaintiff's Exhibit 28 in evidence).

This PIP money went to the three other corporations and therefrom into the Johnson-Linsenmeyer Account. Most all of these monies were transferred by "Advice of Charge" slips, inter-bank handling (T.P. 584).

All these transactions took place after the legitimate indebtedness to MGM had been incurred and known to the principals involved (T.P. 182, 183, 185).

CONCLUSION

In the above analysis of the facts, the evidence and the law is demonstrated that the Appellant and his corporations were one and the same. No amount of verbage or obfuscation can change that. The Judgment of the District Court should be affirmed.

Respectfully submitted,

SHELDON MITCHELL
Attorney for Appellee

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

SHELDON MITCHELL